mean the liquidator is personally liable for such costs. Following the general rule that the liquidator does not sue or defend in his own name but that of the company, the costs in this case should be that of the company. As I have stated aforesaid, this general principle is subject to exceptions as stated aforesaid but in the absence of evidence to the contrary, I have to dismiss this opposing creditors' application.

For this application I shall not award costs to any party.

MAYBAN FINANCE BHD.

v.

AIK SOON AUTO SDN. BHD. (FORMERLY KNOWN AS AIK SOON AUTO FINANCE SDN. BHD.) & 4 ORS.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[SUIT NO. D2-22-1752-91]
9 JULY 1993

CONTRACT: Block discounting agreement - Construction - Whether agreement an agreement to agree or a binding contract - Whether agreement enforceable.

INTERPRETATION OF STATUTES: Agreement void under repealed statute - Agreement made enforceable by repealing statute - Repealing statute having retrospective effect - Whether agreement validated - Finance Companies Act 1969, s. 2 - Banking and Financial Institutions Act 1989, ss. 127, 128.

HIRE-PURCHASE: Defendant executed hire-purchase agreements with third parties - Plantiff purchased en-bloc defendant's contractual rights - Third parties did not execute exclusive assignment of hire-purchase properties to plaintiff - Whether plaintiff's rights to title of hire-purchase properties adversely affected - Whether guarantors in hire purchase agreements prejudiced.

LOCUS STANDI: Agreement executed under plaintiff's old name - Plaintiff sued under its new name - Change of name not pleaded in statement of claim - Defendant questioned locus of plaintiff but did not enter appearance to strike out writ - Whether objection a non-issue.

The plaintiff in this case was formerly known as Malayan Finance Corporation Berhad. While under this entity the plaintiff entered into a block discounting agreement (the master agreement) with the first defendant, a company carrying the business of auto trade. By the master agreement, to which the second defendant was a guarantor, the plaintiff purchased the contractual rights of the first defendant in hire-purchase agreements which the first defendant had with the various hirers. However, as between the plaintiff and the hirers, no exclusive assignment of the hire purchase properties had been executed.

In the meanwhile the plaintiff shed off its old corporate name in favour of the present name,

Mayban Finance Berhad. It then filed a suit against the defendant claiming a sum of RM 1,960,429.80 being the sum allegedly remaining outstanding and payable by the defendant under the said master agreement. The plaintiff subsequently applied for and obtained a summary judgement in respect of the sum claimed and the defendant appealed against this order for summary judgement.

The contentions of the defendants were:

1. That the master agreement was nothing more than an agreement to agree;
2. That the agreement was void and unenforceable in law;
3. That the plaintiff, in its new name, had no *locus standi* to maintain this suit, and
4. That the plaintiff's failure to create any assignment in respect of the properties in the hire-purchase agreements prejudiced the position of the second defendant.

Held:

[1] There is nothing ammbigious about the master agreement and as such it must be considered as a legally binding contract.Although no discount rate is stated in the agreement there was provision for such a rate to be agreed upon and as the first defendant never denied receiving the moneys discounted, the first defendant must be all too aware what the discount rates are and the question of uncertainty, therefore, does not arise.

[2] Although the master agreement is void and unenforceable by virtue of s. 2 of the Finance Companies Act 1969, this position of the law has been regularised by s. 127(1) of the Banking And Financial Institutions Act 1989 which amended s. 2 of the 1969 Act and extended the meaning of the words "finance business" to include the "the provision of finance" which in turn has been defined by s. 127 (2)(b) of the 1989 Act to include the business of acquiring debts due to any person. It is thus clear that by the retrospective effect of the amendments, contracts like the master agreement, which could not be enforceable under the 1969 Act,are now made enforceable under the Banking And Financial Institutions Act 1989.This is so, as after making such amendments to take effect retrospectively, the 1989 Act repealed the whole of the 1969 Act.

[3] If the defendants consider that the plaintiff is not the right party to bring these proceedings, they should have entered a conditional appearance and applied to have the writ and statement of claim struck out on the grounds that the plaintiff has no *locus standi* to maintain this suit against them. This was never done and therefore the defendants' objection as to the plaintiff's status has to be considered as a non-issue.

[4] The purpose of any assignment is to pass the title of the assigned property to the assignee. That purpose has already been taken care of by clause 5 of the master agreement as the plaintiff has already been vested with such a title and as such the execution of any assignment becomes only a formality.

[Appeal dismissed].

Legislation referred to:

Banking and Financial Institutions Act 1989, ss. 127(1), (2)(b), (2)(b)(b), (4), 128(1), (2)(d)
Contracts Act 1950, s. 94
Finance Companies Act 1969, s. 2

Other sources referred to:

R.M. Goode's **Hire-Purchase Law And Practice,** 2nd Edn., p. 659

For the plaintiff - Lim Mook San; M/s. Paul Chong & Kraal
For the 1st and 2nd defendants - Leow Shin Fong (Steven Wong with him); M/s. Arifin & Partners

JUDGMENT

Siti Norma Yaakob J:

The 1st defendant in these proceedings are sued under a block discounting agreement (the Master Agreement) dated 21 September 1977, wherein the plaintiff claims a sum of RM1,960,429.80 as being due and payable by the 1st defendant, particulars of which appear an Annexure A to the statement of claim. The 2nd defendant is sued as a guarantor under a guarantee, also dated 21 September 1977, wherein the 2nd defendant indemnified the plaintiff for all sums due and payable by the 1st defendant under the agreement.

The plaintiff had succeeded in its application to enter summary judgment against the defendants and in their appeal against the order, the defendants raised the following issues:

1. Whether the Master Agreement is only an agreement to agree.
2. Whether the plaintiff has any *locus standi* to bring the present proceedings.

3. Whether the Master Agreement is valid.
4. Whether the failure of the plaintiff to create any assignments of the properties in the hire purchase agreements acquired by the plaintiff has prejudiced the 2nd defendant.

It is the defendants' contention that the Master Agreement is only an agreement to agree to the doing of a specific act, that is, the purchase by the plaintiff of the 1st defendant's contractual rights in hire purchase agreements which the 1st defendant had with various hirers. To that extent, in addition to the Master Agreement, there must be pleaded and exhibited the subsequent agreements entered into by the plaintiff with the 1st defendant for the purchase of particular blocks of the hire purchase agreements which the 1st defendant had with the various hirers.

As far as pleadings go, paragraph 10 of the statement of claim has averred the fact that the plaintiff had entered into several contracts with the 1st defendant to purchase the 1st defendant's contractual rights in several blocks of hire purchase agreements which are exhibited to the plaintiff's affidavit affirmed on 26 August 1992.

As to the true nature of the Master Agreement, this must be scrutinised to ascertain the intentions of the parties. Clauses 1 - 6 are the preambles stating the intentions of the parties. It is only from clause 7 onwards that the obligations of the parties are spelt out and it is very clear that the agreement is for the sale by the 1st defendant of its contractual rights in various hire purchase agreements with third parties and the purchase by the plaintiff of such contractual rights in those hire purchase agreements. I see nothing ambiguous about it and I consider it to be a legally binding contract. It is true that no discount rate is stated in clause 7 but then the same clause makes provision for such a rate to be agreed upon between the parties and there must have been agreement reached on the rate as the 1st defendant never denied receiving the moneys discounted and since there is a duty imposed on the 1st defendant to maintain proper accounts under clause 8(e) of the Master Agreement, the 1st defendant must be all too aware what the discount rates are.

The plaintiff's claim as against the 1st defendant in these proceedings is founded under clause 8(c) of the Master Agreement, that is, the failure by the 1st defendant to collect and/or remit the balance of all sums due under the various hire purchase agreements purchased by the plaintiff. This is so averred in paragraph 11 of the Statement of Claim and in support thereof have exhibited all the blocks of hire purchase agreements acquired by the plaintiff showing the total amounts outstanding to the plaintiff.

The Master Agreement is entered into between the 1st defendant and the Malayan Finance Corporation Bhd. and this has prompted the defendants to question the status of the plaintiff to bring these proceedings against them. Before me Counsel for the plaintiff explained that the plaintiff had changed its name to Mayban Finance Bhd. but this change of name had not been pleaded by the plaintiff. Nonetheless, if the defendants consider that the plaintiff is not the right party to bring these proceedings, they could easily have entered a conditional appearance and applied to have the writ and statement of claim struck out on the grounds that the plaintiff has no *locus standi* to maintain this suit against them. This was never done and I consider that the defendants' objection as to the plaintiff's status is a non-issue.

Under the Finance Companies Act 1969, a finance company like the plaintiff can only carry on the business of finance, which under s. 2 of the Act has been defined to include the lending or investing of finance. To that end, the business of acquiring the debts of another, which is the very nature of the Master Agreement, falls well outside the ambit of the Act and for that very reason, the Master Agreement is void and unenforceable. However, this position of the law has been regularised by s. 127(1) of the Banking And Financial Institutions Act 1989 (BAFIA), by amending s. 2 of the 1969 Act and extending the meaning of the words "finance business" to include "the provision of finance" which in turn has been defined by sub-section (2)(b) of s. 127 of BAFIA to include the business of acquiring debts due to any person. Under sub-section (4) of the same section of BAFIA, these amendments are deemed always to have been an integral part of the 1969 Act as from the date of commencement of the 1969 Act until immediately before the date of commencement of the repeal of the 1969 Act under s. 128(1) of BAFIA.

The 1969 Act came into force on 1st June 1969, and by virtue of the amendments extending the scope of a finance company to enter into the

business of acquiring the debts due to any person as at that date, it is clear that by the retrospective effect of the amendments, contracts like the Master Agreement, which would not be enforceable under the 1969 Act, are now made enforceable by the amendments under BAFIA. This is so, as after making such amendments to take effect retrospectively, BAFIA repealed the whole of the 1969 Act.

The defendants, however, rely on s. 128(2)(d) of BAFIA to maintain that only contracts that were lawfully executed under the 1969 Act were made enforceable by the amendments and since the Master Agreement is void and unenforceable under the 1969 Act, the amendments do not have the effect of legally making it valid and enforceable under BAFIA. Expressed in another way, the retrospective effect of the amendments does not affect the illegality of the Master Agreement, as only contracts legally entered into under the 1969 Act were saved by the amendments.

If indeed that was the intention of s. 128(2)(d), I see no reason for the amendments at all as there is no necessity to confirm the legality of any lawful transaction by an Act of Parliament. Moreover, s. 128(2)(d) comes after s. 127(2) and the words "lawfully executed" in s. 128(2)(d) must be read to include transactions though not lawfully executed initially under the 1969 Act must now be declared to have been made so by the amendments and since such amendments have become an integral part of the 1969 Act since the date of commencement of the 1969 Act, I consider that the Master Agreement is a legally binding contract for which all rights and obligations under the agreement are enforceable by virtue of s. 127(2)(b)(b) of BAFIA.

It is not disputed that besides the 2nd defendant's guarantee, the plaintiff had not executed any other security like the creation of assignments with the various hirers over properties governed by the purchase agreements acquired by the plaintiff. This has caused the 2nd defendant to question the plaintiff's failure to do so, as such a failure has jeopardised his position as a guarantor and indemnifier as he is deprived of the advantage given by s. 94 of the Contracts Act 1950.

The purpose of any assignment is to pass the title of the assigned property to the assignee and in this case the assignee would be the plaintiff. That purpose has already been taken care of by clause 5 of the Master Agreement as the plaintiff has already been vested with such a title and as such the execution of any assignment becomes only a formality. This situation is best expressed by a passage in R.M. Goode's "**Hire-Purchase Law And Practice**", 2nd Edn., at p. 659, as follows:

> As a rule the finance company does not call for a formal assignment of the hire-purchase agreements, or give notice of its interest to the hirers, unless the dealer makes default or for any other reason the finance house wishes to proceed against the hirers direct. The agreement to assign thus remains executory in normal circumstances and this has the advantages first of saving the ad valorem stamp duty that a completed assignment would attract if the consideration were substantial and secondly of preserving undisturbed the business relationship between the dealer and the hirer, who, if all goes well, continues throughout to regard himself as in contract with the dealer and never becomes aware of the finance company's interest in the transaction. For its protection the finance house customarily includes a provision in the master agreement whereby the dealer appoints the finance house the dealer's attorney for the purpose of executing any necessary assignment in the name of the dealer, should this prove necessary.

Clause 9 of the Master Agreement does make provision for the irrevocable appointment of the plaintiff as the Attorney of the 1st defendant for the purpose of executing any assignment requiring to be effected by the 1st defendant and other acts specified by that clause.

The Author then goes further to explain:

> Usually, but not invariably, a finance house taking hire-purchase agreements pursuant to a block discounting agreement also takes title to the goods comprised in the hire-purchase agreements. Where this is to be done the master agreement will usually provide for title to pass automatically as soon as the hire-purchase agreements comprising the goods have been accepted for discounting. In such a case the transfer of title occurs simultaneously with acceptance of the dealer's offer for sale; and if at a subsequent date a formal assignment of the hire-purchase agreement is executed by the dealer this will not make reference to the title to the goods themselves which will have passed previously.

For the reasons that I had given, I had accordingly dismissed the defendants' appeal with costs.

MULPHA TRADING SDN. BHD. & ANOR.

v.

JACK LIM TING CHAI & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[ORIGINATING MOTION NO. R2-25-100-91]
28 JUNE 1993

ADMINISTRATIVE LAW: Definition of "workman" - Industrial Relations Act 1967, s. 2 - Respondent dismissed by applicants - Respondent holding post of Executive Director of first applicant - Industrial Court ruled respondent a "workman" - Whether finding of Industrial Court proper - Whether a company director can be a "workman".

WORDS AND PHRASES: "workman".

Mulpha International Berhad, the second applicant in this case, was formerly known as Mulpha International Trading Corporation Berhad (MITCB). MITCB was a holding company carrying on business through its subsidiaries. One of these subsidiaries was the first applicant, Mulpha Trading Sdn. Bhd. (Mulpha Trading). The first respondent was employed by MITCB as an Executive but was later made to serve Mulpha Trading, first as General Manager and later as its Executive Director. While serving in the latter post the first respondent was dismissed by the applicants. The Minister of Labour made a reference to the Industrial Court concerning the dismissal and the preliminary question that arose before the said Court was whether or not the first respondent was a "workman" as defined by s. 2 of the Industrial Relations Act 1967. The Industrial Court ruled that the first respondent was a "workman" within the definition of that section. The applicants applied to the High Court for the following orders:

(1) An order of *Certiorari* to quash the decision of the Industrial Court; and
(2) An order of *Prohibition* prohibiting the Industrial Court from proceeding further.

Held:

[1] It is not the law that a person who is employed as a director of a company can never be a "workman" under the Act.Whether or not he is a "workman" depends upon the nature of his functions and responsibility in the company.